IN THE

SUPREME COURT OF THE UNITED STATES

FILED
JAN 2 1974
MICHAEL RODAK, JR., CLERK

October Term, 1973

No. 73-1031

WYNN LEWIS ROBINSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH DISTRICT, STATE OF CALIFORNIA

ROBERT L. FITZPATRICK
Attorney at Law
9000 Sunset Boulevard, Suite 1100
Los Angeles, California 90069
(213) 272-7771

Attorney for Petitioner
Under Appointment by the District Court of Appeal, Fourth Appellate District, State of California

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Court of Appeal, Fourth Appellate
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PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF APPEAL, FOURTH DISTRICT,
STATE OF CALIFORNIA

Petitioner Wynn Lewis Robinson, respectfully prays that a Writ of Certiorari issue to review the action of the Court of Appeal, Fourth District,

of the State of California, summarily denying petitioner's motion for recall of the remittitur on July 16, 1973. (Petition for hearing denied by the Supreme Court of the State of California on October 3, 1973.)

OPINION BELOW

No written opinion was issued either by the Court of Appeal in summarily denying petitioner's motion, nor by the Supreme Court of the State of California in denying petitioner's petition for a hearing. Copies of the respective summary denials are appended hereto as exhibits A and B, respectively.

JURISDICTION

The California Supreme Court denied the petition for hearing on October 3, 1973. This Court's jurisdiction is invoked under Title 23, United States Code, § 1257(3).

QUESTIONS PRESENTED

Petitioner was denied due process of law and equal protection of the law in that he was prohibited from petitioning the California Supreme Court for a hearing on the merits of his case because of the failure of the California Court of Appeal to notify him that said court had upheld his conviction until after the time for filing a

petition to the California Supreme Court had run.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in substance that no person shall be deprived of life, liberty or property without due process of law, and that persons charged with crimes shall be treated equally in court proceedings. The Fourteenth Amendment to the United States Constitution makes these rights of criminal defendants applicable to state court trials.

STATEMENT OF THE CASE

In an information filed July 22, 1971, petitioner was charged with a violation of Health and Safety Code Section 11530.5, unlawful possession of marijuana for sale on March 26, 1971. A preliminary hearing was held on July 7, 1971, after which said information was filed. On January 18, 1972, a motion to suppress evidence on the grounds of an unconstitutional search and seizure was denied. On January 24, 1972, the case was submitted on the transcript of the preliminary hearing. On February 17, 1972, defendant was found guilty in the Superior Court, and on March 16, 1972, he was sentenced to three years probation, one year of which he was to serve in jail. On March 16, 1972, defendant filed a Notice of Appeal and posted the requisite

bond. On September 29, 1972, defendant's opening brief was filed in the California Court of Appeal, Fourth District, and thereafter oral argument was held. At all times relevant petitioner has been and is now represented by his present counsel, Robert L. Fitzpatrick, who has throughout the proceedings maintained his office at 9000 Sunset Boulevard, Suite 1100, Los Angeles, California 90069.

Following oral argument, Counsel for defendant received no notice of any action on the appeal by said Court until May 17, 1973, when he received the remittitur by mail at his office. Said remittitur indicated that conviction was upheld and recited that the decision of this Court was filed on March 14, 1973. The remittitur itself was dated May 14, 1973. Thereafter, on June 14, 1973, he received by mail at his office the unpublished decision of said Court, upholding the conviction. The envelope containing said unpublished opinion is postmarked June 13, 1973, and a copy of which is attached hereto as Exhibit "C" and is incorporated by reference as if fully set forth.

Defendant wished to take an appeal on the merits of his case to the California Supreme Court. However, California Rules of Court, Rule 28(b), provides that a petition for hearing to the California Supreme Court must be filed therein within 10 days after the decision of the Court of Appeal becomes final. California Rules of Court, Rule 24(a), provides that decisions of the Court of Appeal become final 30 days after

fi'ing thereof with the clerk of said court. In other words, a defendant whose conviction is upheld by the Court of Appeal has 40 days after said Court's decision is filed in which to petition the California Supreme Court for a hearing. In the instant case the 40 day period ended on April 23, 1973. Yet defendant received no notice of the decision of the said Court until after the said 40 day period.

The period for petition to the California Supreme Court to hear an appeal of the conviction having passed, defendant then moved to recall the remittitur in the Court of Appeal on July 9, 1973, as a prerequisite to petition. Said motion is appended to this petition for the Court's convenience as Exhibit "D". Said motion was summarily denied on July 16, 1973. Defendant thereafter petitioned the California Supreme Court to review the summary denial of his motion to recall the remittitur; said petition was denied without hearing on October 3, 1973 (Exhibit A).

REASONS FOR GRANTING THE WRIT

In clear contravention of the mandate of this Honorable Court declaring that persons should not be deprived of substantial rights before being notified and having an opportunity to be heard, defendant wishes to appeal said denial on the grounds that he has been denied due process and equal protection of law in that through lack of

notice of decision of the Court of Appeal he has been unable to take an appeal which he feels has good grounds under the authority of People v. Smith, 7 Cal.3d 282 (1972), concerning the doctrine of emergency searches.

ARGUMENT

1. LACK OF NOTICE OF THE DECISION OF THE COURT OF APPEAL WAS A DENIAL OF DUE PROCESS OF LAW.

It is a basic tenet of Anglo-American law that notice is essential before any important right or privilege may be taken from an individual. In recent years the concept of proper notice and hearing has been expanded to many areas heretofore immune from such requirements. (See, for example, Sniadach v. Family Finance, 395 US 337, 23 LE 2d 349 (1969), where a summary prejudgment attachment procedure, without notice to the debtor, was held to be a denial of the procedural due process guaranteed by the Fourteenth Amendment.) The essentials of due process are regular and orderly procedure in a court of competent jurisdiction, notice to the defendant, opportunity for the defendant to be heard, and a fair hearing. State v. Natomas Co., 239 Cal.App.2d 547 (1966). Further, it is clear that the right to seek redress in the courts is a protected area within the Fourteenth Amendment. Where, for example, the efforts

of a state prisoner to obtain appellate review are frustrated by prison officials, due process is denied; reasonable access to the courts is guaranteed by the Fourteenth Amendment. DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966).

While due process may be an "elusive concept" and its content may vary with circumstances and the necessities of the situation (Mover v. Peabody, 212 U.S. 78 [53 L.Ed. 410, 29 S.Ct. 235]), the essence of due process is "the protection of the individual against arbitrary action." (Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302 [81 L.Ed. 1093, 1100, 57 S.Ct. 724].) "Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. (Hannah v. Larche, 363 U.S. 420, 442 [L.Ed.2d 1307, 1321, 80 S.Ct. 1502].) "The fundamental requisite of due process of law is the opportunity to be heard.' [Citation.] The hearing must be 'at a meaningful time and in a meaningful manner.'[Citation.]" (Goldberg v. Kelly, 397 U.S. 254, 267 [25 L.Ed. 2d 287, 299, 90 S.Ct. 1011].)

As applied to criminal matters, due process generally includes notice (In re Oliver, 333 U.S. 257 [92 L.Ed. 682, 68 S.Ct. 499]), presence and a hearing (In re Green's Petition, 369 U.S. 689 [8 L.Ed. 2 198, 82 S.Ct. 1114]), and representation by counsel (Mempa v. Rhay, 389 U.S. 128 [19 L.Ed. 2d 336, 88 S.Ct. 254]).

In People v. Youngs, 23 Cal.App.3d 180, 183-184 (1972), the Court of Appeal ruled that after probation may be revoked and before sentencing, the defendant must be given a duly-noticed hearing. Similarly, in the land-mark case of Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484 (1972), due process, meaning among other things a noticed hearing, was extended to processes for revocation of parole.

It is submitted that the original lack of notice of the decision of the Court of Appeal, will, if allowed to remain uncorrected by the granting of this writ, result in just that denial of due process which is repugnant to the constitution.

2. LACK OF NOTICE WAS DIRECTLY RESPONSIBLE FOR DEFENDANT'S FAILING TO PETITION THE CALIFORNIA SUPREME COURT FOR A HEARING WITHIN THE TIME PROVIDED BY LAW.

All decisions of reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court and to the parties. The decision of the Court of Appeal becomes final as to that Court 30 days after filing (emphasis added)

California Rules of Court 24(a)

A party seeking a hearing in the California Supreme Court must serve and file a petition within 10 days after the decision of the Court of Appeal becomes final. (Emphasis added)

California Rules of Court 28(b)

In the instant case, the decision of the Court of Appeal was filed on March 14, 1973. It became final on April 13, 1973. Defendant's time to petition the Supreme Court ran out on April 23, 1973. Yet it was not until May 17, 1973, that counsel for defendant received any notice whatsoever of the decision of said court, some 60 days after the filing of said decision, and far too late to file a petition to the California Supreme Court. In derogation of the clear mandate of Rule 24(a), notice of decision was not sent "forthwith" "to all parties," at least not to defendant. Absent timely notice, defendant had no way of knowing that his conviction had been upheld, and that his time to petition the California Supreme Court for a hearing had begun to run. Not having received the said notice until after the 40 day period had run, petitioner was absolutely prohibited from filing the said petition within the time period allowed by California law.

3. DEFENDANT WAS DENIED EQUAL PROTECTION OF THE LAW IN THAT, HAD THE OPINION BEEN PUBLISHED INSTEAD OF UNPUBLISHED, HIS COUNSEL WOULD HAVE SEEN THE DECISION IN THE LEGAL PRESS, AND WOULD HAVE FILED A TIMELY PETITION.

Pursuant to California Rules of Court, Rule 976(b) permits opinions of the Court of the Appeal to be unpublished in the Official Reports. Only those opinions which are to be published are released to the Reporter of Decisions, and to the legal press.

This Court is respectfully requested to take judicial notice of the fact that published opinions appear in the legal press within a short time after filing thereof. For example, the July 26, 1973 issue of the Los Angeles Daily Journal carried short summaries of two state cases filed July 18, 1973, well within the time for petitioning for a hearing. A copy of said summaries are attached hereto as Exhibit "E". At the latest, the cases would have appeared in the advance sheets. By one of these two publications, defendant's counsel would have, in all likelihood, been informed of the Court's decision, notwithstanding lack of notice directly from the Court of Appeal; counsel could have then filed a timely petition

for hearing to this Court. But since the decision was unpublished, defendant had none of the advantages of those appellants in whose cases decisions were published. While it is perhaps the unusual case in which defendant is not timel notified of the decision of the Court of Appeal, nevertheless such lack of notice must occur from time to time in a Court system as big as California's. To condition notice in such situations on whether an opinion is published or unpublished (a circumstance which has nothing whatever to do with the merits of the individual case) is to create two classes of litigants, which classification is arbitrary, capricious, and unreasonable. And surely defendant's counsel is not, in this modern day society, expected to camp at the courthouse door, anxiously awaiting decisions on each of the cases in which he has represented appellants, for fear that the clerk would forget to mail the notice specified by Rule 24(a).

The Court is respectfully requested to note that defendant has suffered a felony conviction, an event that will follow him the rest of his life. To preclude him from exhausting every remedy allowed him by law is intolerable in a civilized society.

4. RECALL OF THE REMITTITUR IS JUSTIFIED WHERE THERE HAS BEEN A DENIAL OF DUE PROCESS.

In Posello v. Posello, 123 Cal.App.2d 31 (1954), the Court held that a remittitur need not be recalled in order to allow a petition for certiorari, to the United States Supreme Court, where it appeared that no denial of due process had occurred. The logical converse of this argument, of course, is that recall would be proper where such a denial did in fact take place. If petitioner's contention that lack of timely notice of the decision of the Court of Appeal constitutes denial of due process in the circumstances of this case is accepted, it logically follows that recall of the remittitur, and reinstatement of the petitioner's time in which to petition the California Supreme Court for a decision on the merits is justified.

5. RECALL OF THE REMITTITUR IS THE PROPER REMEDY IN THIS CASE.

The recall under Rule 25(d) may be ordered on the grounds of clerical error, fraud, mistate, or inadvertence.

> Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal. 20 623, 626 (1952), Oppenheim v. Dutchman, 161 Cal.App.2d

501, 504 (1958), McClearen v. Superior Court, 45 Cal.2d 852, 856-857 (1955)

In point is In re Martin, 58 Cal.2d 133 (1962), a habeas corpus proceeding by a prisoner contending a deprivation of his right to appeal. The prisoner was not advised of the status of his appeal in spite of repeated efforts to contact his attorney, who had decided to abandon the case. He contacted the clerk of the Court of Appeal, who indicated that time had run and no remedies were available. Several other letters from the prisoner to the court followed, but the prisoner obtained no relief. He finally asked for a recall of the remittitur, which was granted. The court said:

> "Where a prisoner seeking judicial relief fails to take timely actions due to an act or restriction of those charged with offician responsibility, it has been held that such a person cannot be denied relief (Peo. v. Slobodion, 30 Cal.2d 362). Where the acts which cause late filing are those of a clerk of the court or other administrative official, the right to file is preserved. (Peo. v. Howard, 166 Cal. App.2d 638; Peo. v. Stinchcomb, 92 Cal. App.2d 741). "58 Cal.2d at 140."

Petitioner contends that his failure to take timely action is due to the failure of a clerk of the court or of some administrative official. Yet no determination has ever been made of this contention. The Court of Appeal issued a summary denial of petitioner's motion; the

California Supreme Court impliedly affirmed by denying a petition for hearing on the issue of the denial of the motion to recall the remittitur. At the very least, petitioner believes he is entitled to a judicial determination his claim that timely notice was never given by the Court of Appeal.

CONCLUSION

Petitioner is not seeking, at this stage, a review by this Honorable Court, of the substantive issues of his trial. He merely seeks the right to pursue all avenues of appeal open to him, which avenues have been closed by lack of timely notice of aforesaid. To deny him this simple right, which he lost through absolutely no fault of his own, would be to render meaningless the notions of fair dealing and due process upon which our judicial system is founded, and which is the hallmark of a civilized society. It is respectfully submitted that this petition be granted.

ROBERT L. FITZPATRICK

Attorney for Petitioner
Under Appointment by the
District Court of Appeal,
Fourth Appellate District,
State of California

EXHIBIT A

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 3 1973

I have this day filed Order

HEARING DENIED

In re: 4 Crim. *No.* 5141

People

vs.

Robinson

Respectfully,

G. E. BISHEL
Clerk

11921 877 9 73 3M OSP

COURT OF APPEAL — STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

Court of Appeal - Fourth Dist.
FILED
JUL 16 1973
JOHN R. McDOWELL, Clerk
Deputy Clerk

PEOPLE, ETC.,

vs.

WYNN LEWIS ROBINSON

4 Crim. NO. 5141

SUPERIOR COURT NO. CRN-1763

BY THE COURT:

Defendant's motion to recall remittitur and reinstate appeal is denied.

Wilson Acting P.J.

Copies to: Robert L. Fitzpatrick-LA
Attorney General-SD
District Attorney-SD
Superior Court-SD

EXHIBIT B

88CCS-114 11-71 3M OSP

EXHIBIT "A"

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
CIVIL RIGHTS BUILDING
STH U'ZOO, CALIF. 92101

Mr. Robert L. Fitzpatrick
Attorney at Law
9000 Sunset Blvd., Suite 1100
Los Angeles, California 90069

Exhibit A

Court of Appeal - Fourth Dist.
FILED
JUL 11 1973
JOHN R. McDOWELL, Clerk
Deputy Clerk

No. 4 Crim. 5141

IN THE

COURT OF APPEAL

OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

WYNN LEWIS ROBINSON

MOTION TO RECALL REMITTITUR AND REINSTATE THE APPEAL IN ORDER TO PETITION FOR HEARING BEFORE THE SUPREME COURT OF THE STATE OF CALIFORNIA; DECLARATION OF ROBERT L. FITZPATRICK; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

ROBERT L. FITZPATRICK
Attorney at Law
9000 Sunset Boulevard, Suite 1100
Los Angeles, California 90069

(213) 272-7771

Attorney for Defendant and Appellant
Under Appointment by the District
Court of Appeal, Fourth Appellate
District

EXHIBIT "D"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, -vs- WYNN LEWIS ROBINSON, Defendant and Appellant.	No. 4 Crim. 5141

MOTION TO RECALL REMITTITUR AND REINSTATE THE APPEAL IN ORDER TO PETITION FOR HEARING BEFORE THE SUPREME COURT OF THE STATE OF CALIFORNIA; DECLARATION OF ROBERT L. FITZPATRICK; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

ROBERT L. FITZPATRICK
Attorney at Law
9000 Sunset Boulevard, Suite 1100
Los Angeles, California 90069

(213) 272-7771

Attorney for Defendant and Appellant
Under Appointment by the District
Court of Appeal, Fourth Appellate
District

TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT:

Defendant and Appellant Wynn Lewis Robinson respectfully moves the court for an order recalling the remittitur and reinstating the appeal in order to petition for hearing in the Supreme Court of the State of California.

This motion is made on the grounds that defendant was not notified of the decision of the above entitled court affirming his conviction within the period prescribed for petitioning the Supreme Court for hearing, said lack of notice hereby deprived defendant of an opportunity to petition the Supreme Court in being the denial of due process of law.

Said motion is based upon pleadings, records, and filings in this action, the attached declaration of Robert L. Fitzpatrick, the attached Memorandum of Points and Authorities, and Exhibit "A" attached hereto.

Respectfully submitted,

Dated: July 9, 1973

Robert L. Fitzpatrick
Attorney for Defendant and Appellant
Under Appointment by the District
Court of Appeal, Fourth Appellate
District

DECLARATION OF ROBERT L. FITZPATRICK

I, Robert L. Fitzpatrick, declare and state as follows:

1. I am an attorney at law duly qualified to practice in all Courts of the State of California. At all times herein I have maintained my office at 9000 Sunset Boulevard, Suite 1100, Los Angeles, California 90069.

2. I am the attorney of record for the defendant in the instant action, and make this declaration in support of the motion of defendant for an order recalling the remittitur in said case.

3. In an information filed July 22, 1971, my client was charged with a violation of Health and Safety Code Section 11530.5, unlawful possession of marijuana for sale on March 26, 1971. A preliminary hearing was held on July 7, 1971, after which said information was filed. On January 18, 1972, a motion to suppress evidence on the grounds of an unconstitutional search and seizure was denied. On January 21, 1972, the case was submitted on the transcript of the preliminary hearing. On February 17, 1972, defendant was found guilty by the Court, and on March 16, 1972, he was sentenced to three years probation, one year of which he was to serve in jail. On March 16, 1972, defendant filed a Notice of Appeal and posted the requisite bond.

4. On September 29, 1972, I filed defendant's opening brief with this Court.

5. I received no notice of any action by this Court until May 17, 1973, when I received by mail at my office, the remittitur. Said remittitur recited that the decision of this court was filed on March 11, 1973. The remittitur itself was dated May 14, 1973.

6. On June 14, 1973, I received by mail at my office the unpublished decision of this Court. The envelope containing said unpublished opinion is postmarked June 13, 1973, and is attached hereto as Exhibit "A"

and is incorporated by reference as if fully set forth.

7. Having represented by client from the times of his preliminary hearing, having consulted with him, and having researched the applicable law, I believe that defendant has good grounds for an appeal to the Supreme Court on the authority of People v Smith, 7 Cal 3d 282 (1972), concerning the doctrine of emergency searches.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 9, 1973, at Los Angeles, California.

Robert L. Pettigrew

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant submits the following memorandum of points and authorities in support of his motion to recall the remittitur in the instant case:

1. A REMITTITUR MAY BE RECALLED BY ORDER OF THE REVIEWING COURT ON ITS OWN MOTION OR ON MOTION OR PETITION AFTER NOTICE SUPPORTED BY AFFADAVITS.

California Rules of Court, Rule 25 (d)

The recall may be ordered on the grounds of clerical error, fraud, mistate, or inadvertence.

Southwestern Inv. Corp. v City of Los Angeles, 38 Cal 2o 623, 626 (1952), Oppenheim v. Dutchman, 161 Cal App 2d 501, 504 (1958), McClearen v Superior Court, 45 Cal 2d 852, 856-857 (1955)

2. DENIAL OF THIS MOTION WILL RESULT IN A DENIAL OF DEFENDANT'S RIGHT TO APPEAL HIS CONVICTION TO THE SUPREME COURT.

All decisions of reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court and to the parties. The decision of the Court of Appeal becomes final as to that Court 30 days after filing. (emphasis added)

California Rules of Court 24 (a)

A party seeking a hearing in the Supreme Court must serve and file a petition within 10 days after the decision of the Court of Appeal becomes final. (emphasis added)

California Rules of Court 28 (b)

In the instant case, the decision of the Court of Appeals was filed on March 14, 1973. It became final on April 13, 1973. Defendant's time to petition the Supreme Court ran out on April 23, 1973. Yet it was not until

May 17, 1973, that counsel for defendant received any notice whatsoever of the decision of this court, some 60 days after the filing of said decision, and far too late to file a petition to the Supreme Court. In derogation of the clear mandate of Rule 24 (a), notice of decision was not sent "forthwith" "to all parties," at least not to defendant.

The court is respectfully requested to note that defendant has suffered a felony conviction, an event that will follow him the rest of his life. To preclude him from exhausing every remedy allowed him by law is intolerable in a civilized society.

It is a basic tenet of Anglo-American law that notice is essential before any important right or privilege may be taken from an individual. In recent years the concept of proper notice and hearing has been expanded to many areas heretofore immune from such requirements. (See, for example, Sniadach v Family Finance, 395 US 337, 23 LE 2d 349 (1969), where a summary prejudgment attachment procedure, without notice to the debtor, was held to be a denial of the procedural due process guaranteed by the Fourteenth Amendment.) The essentials of due process are regular and orderly procedure in a court of competent jurisdiction, notice to the defendant, opportunity for the defendant to be heard, and a fair hearing. State v Natomas Co., 239 cal app 2d 547 (1966). Further, it is clear that the right to seek redress in the courts is a protected area within the Fourteenth Amendment. Where, for example, the efforts of a state prisoner to obtain appellate review are frustrated by prison officials, due process is denied; reasonable access to the courts is guaranteed by the Fourteenth Amendment. DeWitt v Pail, 366 F. 2d 682 (9th Cir, 1966),

It is submitted that the original lack of notice of this court's decision, while indoubtedly due to mistake or clerical oversight or error, failure of the postal system or loss or mail theft, and not to deliberate plan

or design, will, if allowed to remain uncorrected by the granting of this motion, result in just that denial of due process which is repugnant to the constitution.

3. RECALL OF THE REMITTITUR IS THE PROPER REMEDY IN THIS CASE.

As noted above, a remittitur may be recalled for clerical error, fraud, mistake or inadvertence, and defendant may then pursue his petition to the Supreme Court. In point is In re Martin, 58 Cal 2d 133 (1962), a habeas corpus proceeding by a prisoner contending a deprivation of his right to appeal. The prisoner was not advised of the status of his appeal in spite of repeated efforts to contact his attorney, who had decided to abandon the case. He contacted the clerk of the Court of Appeal, who indicated that time had run and no remedies were available. Several other letters from the prisoner to the court followed, but the prisoner obtained no relief. He finally asked for a recall of the remittitur, which was granted. The court said:

> "Where a prisoner seeking judicial relief fails to take timely actions due to an act or restriction of those charged with official responsibility, it has been held that such a person cannot be denied relief (Peo. v Slobodion, 30 Cal 2d 362). Where the acts which cause late filing are thos of a clerk of the court or other administrative official, the right to file is preserved. (Peo. v Howard, 166 Cal App 2d 638; Peo. v Stinchcomb, 92 Cal App 2d 711). " 58 Cal 2d at 140.

Undoubtedly defendant's failure to receive notice was due to a clerical or administrative error, or a failure of the United States Postal system. As such, his right to file his peition for a hearing should be preserved, and the remittitur should be recalled.

In accord are Oil Base v Transport Indem Co., 148 Cal App 2d 490 (1951), where failure to fix a date from which interest should be calculated was grounds for a recall, and People v Bartges, 128 Cal App 2d 496 (1954),

where the appellate court was mistakenly advised that the defendant had three prior convictions, but in fact two were struck by the trial court. "A mistake of fact by an appellate tribunal which results in prejudicial error or a miscarriage of justice affords a proper ground for recall of the remittitur." 128 Cal App 2d at 497-498. Defendant submits that denial of his right to petition for a hearing would be such a miscarriage of justice.

4. DEFENDANT HAS GOOD GROUNDS FOR APPEAL.

The entire disposition of the substantive issues in this case revolves around the reasonableness of the search of defendant's hotel room. The people seek to justify the search on the emergency search doctrine. The record indicates that defendant was asleep in his hotel room when the room clerk, for reasons that are not clear to defendant, summoned the police, who then entered his room where they found marijuana. In People v Smith, 7 Cal 3d 282 (1972), a landlady found her tenent's six year old child outside the tenant's apartment. She took the child to her apartment and later called the police. A police officer, without a warrant, knocked on tenant's door and identified himself, but received no response. He then entered the apartment, called the mother's name, but received no answer. He found some marijuana, and when the mother returned, he arrested her. The Supreme Court affirmed the suppression of evidence, holding that "the (emergency search) exception must not be permitted to swallow the rule; in the absence of a showing of true necessity - that is, imminent and substantial threat to life, health, or property - the constitutionally guaranteed right to privacy must prevail" 7 Cal 3d at 286.

In the instant case, we have no such clear showing of imminent danger. The hotel clerk did not bother to check the sleeping defendant for signs of life. Nor was the entering police officer very concerned about the supposedly unconscious or perhaps dead man. Defendant believes that he

can successfully argue that the entry into his hotel room was based on mere suspicion of an untrained observer that marijuana might be present, and not on any great concern for his well-being.

CONCLUSION

By the actions of the clerk of this court, or a failure of the United States Postal system, the time for filing a petition with the Supreme Court ran before defendant was notified that his conviction was affirmed. Denial of this motion would result in defendant's being denied his right to petition for a hearing, and would therefore because of the last of notice be a denial of due process repugnant to the Constitution. Recall of the remittitur is the proper remedy, before defendant can proceed further. Defendant believes he can perfect a successful appeal.

It is respectfully submitted that this motion be granted.

Dated: July 9, 1973

Robert L. Fitzpatrick
Attorney for Defendant

Suspicion Sufficient To Permit Search

The C.A. 4th recently held that where a customs officer, whose duty it is to inspect merchandise which crosses the border into the United States, reasonably suspects that the imported item contains contraband, he may search the item.

The State Supreme Court retransferred to the Court of Appeals a determination as to the merits of issuing an alternative writ of mandate requested by the People to set aside the lower court's order suppressing evidence.

Defendants were arrested when they claimed surf boards delivered from Pakistan which were found to contain hashish.

The customs officer noticed that the surf boards were heavier than ones of similar size. Having himself discovered contraband in surf boards imported from the same area within recent months, the officer punctured the board with his pocket knife, causing the release of a gas with the odor of marijuana. He then cut a one inch square and examined some of the substance to confirm his suspicion.

The court noted that although a border search must meet the Fourth Amendment test of reasonableness, it may be conducted on the mere suspicion of the customs agent that contraband is undeclared. The quantum of suspicion required to satisfy the reasonableness test, and thereby justify the governmental intrusion, depends on the degree of intrusion and the extent of a person's reasonable expectation of privacy.

The court observed that since it was a matter of judicial record that Pakistan was a source of hashish in recent years and due to the personal experience of the officer involved, suspicion of any surf board arriving from Pakistan was warranted.

The C.A. vacated the order suppressing the evidence.

People v. Superior Court, C.A. 4th, 4 Civ. 13085, July 18, 1973, per Kerrigan, J. Cecil Hicks, Michael R. Capizzi, Oretta D. Sears for petitioner; Frank L. Williams, Jr., Gale P. Hickman, Russell E. Parsons and Michael D. Pursell for real party in interest. (ams)

EXHIBIT "E"

Rulings Summarized

Following are condensed versions of the latest opinions of the California Appellate Courts. These brief statements of the rulings are printed for quick checking by the attorney. The full text of the opinion should be read before any case is cited in litigation. It will appear in the near future in the weekly Appellate Report supplement.

Right to Vote Not Denied In County Reorganization

The C.A. 3d. has held that in a reorganization of recreation and park districts the consent of the community whose property is to be detached and annexed by an adjacent community is not required pursuant to the District Reorganization Act of 1965 (Government Code Sec. 56000 et seq.).

Plaintiffs appeal a dismissal of their complaint, without leave to amend, following the sustaining of the general demurrer to the second amended complaint.

The Sacramento County Board of Supervisors examined a reorganization plan to detach an area from Del Paso, an "autonomous district," and to annex that territory to Citrus Heights, an area governed by the Sacramento Board. The board proposed a resolution calling for a confirmatory election by the residents of the territory. However, due to disagreement over the extent of the franchise, the supervisors changed the original preference for an election and ordered the annexation.

In holding that the residents of Del Paso were not denied their constitutional "right to vote," the court noted that the consent requirement of Sec. 56004 is qualified in light of the other relevant provisions of the Reorganization Act. The C.A. observed that since the legislative intent was to facilitate reorganization which would be responsive to the needs of the voters, taxpayers and the community, where reorganization was of the magnitude undertaken by the Sacramento board, consent was not required.

The court also noted that Del Paso's reliance upon the board's initially expressed preference for a confirmatory election did not give rise to an issue of estoppel.

Del Paso Recreation and Park District v. Board of Supervisors of the County of Sacramento, C.A. 3d, 3 Civ. 13535, July 18, 1973, per Janes, J. (ams)

Public Won't Confuse 'Playgirl' With 'Playboy'

Agreeing with the district court's finding that "the name 'Playgirl' is not likely to cause confusion to members of the public with 'Playboy'," the Ninth Circuit Court of Appeals affirmed that lower court's ruling that the users of the former name were not infringing on the trademarks of the latter nor engaging in any unfair competition.

Defendants were proprietors, at various times, of nightclubs named "The Play Girl," "The Play Girl No. 2," "The Play Girl No. 3" and "Playgirl Club." Playboy Clubs International and its parent corporation, HMH Publishing Co., Inc., sued for trade-name infringement under the federal Lanham Act and unfair competition under California law. The physical lay out of defendants clubs was found to bear "no resemblance to a Playboy Club," nor were the costumes of the waitresses and dancers similar to those of Playboy bunnies. There was no separate dining room or bar in their facilities and no food was served other than sandwiches. The trial court concluded from these facts that there was "no likelihood of confusion as to the source of the nightclubs operated by defendants."

On appeal, plaintiff's pointed to their enormous expenditures on advertising and promotion as a factor entitling them to greater protection. The appellate court rejected this contention, quoting from one of its previous opinions that "a large expenditure of money does not in itself create legally protected rights." Nor did the three judge panel disagree with the trial court's use of the "likely to cause confusion" test. Appellant's argument for relief under California law was also dismissed by the appellate court, which quoted an earlier district court opinion to the effect that an "overly broad application" of state law be avoided "lest it swallow up all competition in the claim of protection against trade name infringement."

HMH Publishing Co., Inc. v. Lambert, USCA 9th, 71-2007, July 10, 1973, per Trask, J. . (jjm)

Private Insurers Are 'Gov't. Agents' for Medicare Purposes

The Ninth Circuit Court of Appeals has held that private insurance carriers utilizing federal funds to pay the Medicare claims of physicians are "government paying agents." The ruling rejected the arguments of an appellant doctor and affirmed his conviction for committing fraud upon a U.S. "department or agency."

Appellant, a San Fernando Valley physican, had been indicted on 46 counts of submitting false Medicare claims to various private insurance companies. The insurers process and pay these claims under contracts with the Social Security Administration of the U.S. Department of Health, Education and Welfare. Appellant had made representations on each of the 46 claims that he had made a number of visits to elderly patients in various convalescent hospitals. Many of these same patients testified at trial that they were visited infrequently, if at all, by appellant. Their testimony was fully corraborated by nursing personnel at the facilities.

In addition, some of the patients had not even been in the hospitals on the days appellant claimed to have visited them. The jury found appellant guilty on 39 counts of the indictment, the government having dropped the remainder. The physician was

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Rulings Summarized

Continued from Page 1

sentenced to pay fines totaling $53,500.00 and received a suspended prison sentence.

Many of appellant's appeal points were called "frivolous" and not even discussed by the appellate panel. His argument was that the private carriers were not a government agency and therefore the indictment failed to state an offense against the government. The court held that the insurers were "government paying agents" for the purpose of 18 USC Sec. 1001, the "fraud on an agency" statute under which appellant was indicted. The panel also found that the statute was not void for vagueness and they dismissed other numerous arguments by appellant, specifically, concluding that "we find none of them meritorious."

U.S. v. Matanky, USCA 9th, 73-1190, July 5, 1973 per Hamlin, J. (jjm)